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No. 94-1474

Supreme Court, U.S.

FILED

AUG - 5 1996

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1995

IDAHO, et al.,

Petitioners,

v.

COEUR d'ALENE TRIBE OF IDAHO, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

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ARGUMENT

A. Eleventh Amendment Concerns Cannot Be Circumvented Simply By Dismissing The State As A Nominal Party.

The Eleventh Amendment is a cornerstone of our constitutional structure. It stands for the "constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1127 (1996). The Amendment's preservation of the balance between state and federal authority has withstood numerous challenges before this Court. The Coeur d'Alene Tribe, in its responsive brief, mounts the latest challenge against the Eleventh Amendment by proposing that the legal fiction of *Ex parte Young*, 209 U.S. 123 (1908), be elevated to the lofty heights of unassailable doctrine. In the process, it forgets *Young* is a narrow exception to Eleventh Amendment immunity that must be examined critically in every case where its application is proposed in order to avoid intruding on the sovereignty of the states.

In *Florida Dept. of State v. Treasure Salvors, Inc.*, eight members of the Court agreed that the Eleventh Amendment forbids federal courts from adjudicating a state's interest in property without the state's consent. 458 U.S. 670, 682, 703 (1982). The Ninth Circuit Court of Appeals held, and the Tribe argues, that this principle is fulfilled in this case by limiting the determination of title to "the Tribe's ownership interest against the rest of the world other than Idaho and its agencies." Tribe's Brief at 15.

The Tribe proposes that so long as the state is not a nominal party to an action determining title to property claimed by the state, there are no Eleventh Amendment concerns. The Tribe's argument hails back to the long-discarded rule of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), wherein the Court held that the Eleventh Amendment is "limited to those suits in which a state is a party on the record." 22 U.S. (9 Wheat.) at 857.

It is now well-established, however, that "the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record." *Poindexter v. Greenhow*, 114 U.S. 270, 287 (1885). Instead, "the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984). In other words, *Treasure Salvor's* prohibition on the adjudication of state title to property cannot be satisfied by dismissing the state as a nominal party if the relief sought by the plaintiff nonetheless has the effect of adjudicating the state's title.

In this case, the only supportable conclusion is that the relief sought by the Tribe will have the effect of adjudicating Idaho's title to the disputed submerged lands. As more fully explained in the state's opening brief, adjudication of this case begins from the strong presumption that the state has title to the disputed submerged lands. *Montana v. United States*, 450 U.S. 544, 552-54 (1981). Even in the absence of the state as a nominal party, the Tribe cannot disprove the presumption of state ownership without adjudicating the state's claim to the disputed submerged lands.

The Tribe attempts to dodge this issue by stressing that it will amend its complaint so that the only relief it obtains is a decree of its rights and an injunction requiring state officers to act in accordance with those rights. The drafters of the Eleventh Amendment, however, did not intend a state's sovereign immunity to be subverted through artful pleading. It is always necessary to go below the surface of the pleading and examine the true nature of the claims. In this case, because of the presumption of state title, the competing claims of the state and the tribe form a zero-sum game: the trial court must decree that the state *is not* the owner in order to decree that the Tribe *is* the owner.

The Tribe further contests the need to adjudicate the state's claim by inferring that the only question it seeks to adjudicate is whether the United States reserved or conveyed

title to the Tribe. The implication is that because the alleged conveyance occurred prior to Idaho's admission to the Union, the court need not determine whether title passed to Idaho upon its admission. Such an argument ignores the fundamental fact that during the territorial period the United States held the disputed submerged lands in trust for the future state of Idaho. *Shively v. Bowlby*, 152 U.S. 1, 49, 57 (1894). In order to prevail, the Tribe must prove that the United States made an affirmative decision to defeat the state's title by conveying it to the Tribe. As the beneficiary of the trust taken on by the United States, any allegation that the United States undertook to convey the trust property to the Tribe necessarily adjudicates the state's claims to the property.

B. Suits Against Federal Officers Provide Valuable Guidance In Eleventh Amendment Cases Because The Underlying Principles Of Sovereign Immunity Are Identical.

The Tribe asserts that Idaho errs by looking to suits against federal officers for guidance in determining whether an action is in effect against the state. In the Tribe's view, actions against state officers alleged to be in violation of federal law cannot be compared to actions against federal officers because of the need to protect the supremacy of federal laws. The Tribe interprets *Young* as a per se rule that allows plaintiffs to escape the restrictions of the Eleventh Amendment through the simple step of alleging violations of federal law by state officers. In the Tribe's view, once it is alleged that an officer is in violation of federal law, the court need inquire no further.

First, the Tribe's fundamental premise, that it seeks to vindicate the supremacy of federal law over state law, fails. As noted more fully in the state's opening brief, the claims of both the state and the Tribe originate in federal law. Even supposing that the Tribe is correct in characterizing this as a supremacy case, the Tribe ignores the fact that *Young* embodies a "balance of federal and state interests." *Papasan*

v. Allain, 478 U.S. 265, 277 (1986). The federal interest is the need to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Id.* at 277, quoting *Pennhurst*, 465 U.S. at 105. The states' interests include retaining their ability as sovereigns to determine where they may be sued and the circumstances under which they may be sued, *Pennhurst*, 465 U.S. at 99, and avoiding "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Pennhurst*, 465 U.S. at 100. Because of the need to maintain the balance of interests, the line between permitted and prohibited suits is not as bright as the Tribe believes. Some cases "formally meet the *Young* requirements" but nonetheless stretch *Young* beyond its allowable limits. *Papasan*, 478 U.S. at 277.¹

Because *Young* is a balancing test, a federal court cannot rely on the mere fact that the plaintiff alleges a violation of federal law by state officers. The court must always examine the relief sought to determine whether the relief is of such a nature that it involves the state as a real and substantial party in interest. "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst*, 465 U.S. at 101, quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (per

¹ Because *Young* is an exception to state sovereign immunity, the Tribe and its amici are simply wrong when they describe the state as seeking an "exception" to *Young*. Rather, the state simply asserts that the relief sought by the Tribe falls outside the narrow bounds of the *Young* exception. Likewise, the Tribe and its amici are wrong when they infer that to rule in Idaho's favor the Court must overrule decisions such as *Tindal v. Wesley*, 167 U.S. 204 (1897), which allowed a suit against state officers for possession of lands seized by state officers pursuant to state laws. *Tindal* has been "clarified" by *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), and the principles espoused by Idaho are consistent with *Larson*. Moreover, this case is distinguished from *Tindal* and similar decisions because, in the unique circumstances present in an equal footing case, it is impossible to proceed without adjudicating the state's title.

curiam). If relief operates directly against the state it is barred, regardless of the nature of the relief sought. "[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996).

The determination of whether relief operates against the sovereign is inherent to all suits involving sovereign immunity, whether those suits involve state or federal officers. Thus, in construing state sovereign immunity, this Court has often looked to federal officer suits for guidance, and vice versa. A primary example is *Treasure Salvors* itself, where the Court, in determining the scope of Eleventh Amendment immunity, turned for guidance to *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), an action against federal officers. In turn, the *Treasure Salvors* Court noted that *Larson* "clarified" previous Eleventh Amendment decisions such as *Tindal v. Wesley*, 167 U.S. 204 (1897). 458 U.S. at 688.² Thus, it is entirely appropriate to turn to federal officer suits for guidance in determining "whether the relief sought against the officer is not, in substance, sought against the sovereign." *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952).³ Indeed, the Court should be hesitant to violate the principles of federalism embodied in the Eleventh Amendment by adopting a rule of immunity for state officers that is less protective of state sovereignty than the rules of immunity adopted for the protection of federal sovereignty.

² *Larson* itself looked to Eleventh Amendment decisions in determining the scope of federal sovereign immunity. See *Larson*, 337 U.S. at 691 n.11, discussing *North Carolina v. Temple*, 134 U.S. 22 (1890); 337 U.S. at 698 n.20, discussing *Tindal v. Wesley*, 167 U.S. 204 (1897); and 337 U.S. at 699 n.22, discussing *Poindexter v. Greenhow*, 114 U.S. 270 (1884).

³ Notably, *Redwine*, an Eleventh Amendment decision addressing an alleged violation of federal constitutional rights, cited *Larson* as authority for the quoted principle. 342 U.S. at 304.

C. The Question Of Whether An Action Will Adjudicate State Claims To Property Must Be Addressed Regardless Of Whether The Plaintiff Alleges A Violation Of State Or Federal Law.

The Tribe argues that federal courts need only determine the effect of injunctive relief on state claims to property when the plaintiff alleges that a state officer's actions are *ultra vires* his statutory authority. The Tribe would do away with the need to determine the effect of injunctive relief on state claims to property where the plaintiff alleges that the officer's actions violate federal law.

The primary focus of the analysis adopted in *Treasure Salvors*, however, is to determine whether proceeding against state officers will, in substance and effect, operate against the state. This concern applies equally to all suits against state officers involving title to property, whether the officer's possession of the property is alleged to be *ultra vires* his authority or in violation of federal law. The Eleventh Amendment bars all actions against the state itself, regardless of the nature of the violations alleged in the complaint. *Seminole*, 116 S. Ct. at 1124.

The Tribe's primary mistake is in making a negative inference from the fact that in actions alleging that state officers are acting in violation of state law, the balance of interests falls on the side of protecting state sovereignty, and the court is relieved of the need to reconcile competing state and federal interests. *Pennhurst*, 465 U.S. at 106. That does not necessarily infer, however, that in an action alleging a violation of federal law by state officers that the court is relieved of the responsibility of determining whether the requested relief will operate, in substance, against the state. As this Court noted in *Pennhurst*, "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." 465 U.S. at 105. Thus, if anything, the need to determine whether the requested relief will require adjudication of state claims to disputed property is even greater in cases alleging a violation of federal law,

since it is in those cases where the balance of state and federal interests is directly at issue.

The nature of the state's claim to property is a factor in determining whether the action is in substance against the state. The Tribe denies that its action is in substance against the state because it denies that the state has title or even color of title to the disputed submerged lands. Instead, it asserts that the presumption of state title is merely a rebuttable presumption. The presumption of state title to submerged lands, however, is not a mere evidentiary rule, it is substantive law upon which the states are entitled to rely in exercising their sovereignty. The presumption does not go into effect only when a suit is filed to determine title to submerged lands; it is a principle that finds application immediately upon the state's admission to the Union. Upon admission, the state is presumed to possess title to all submerged lands within its boundaries, and may act on that presumption until such time as title to specific submerged lands is defeated through an appropriate court action.

This principle is demonstrated by the fact that Idaho state court decisions have recognized state title and public rights in the disputed submerged lands. In *Burrus v. Edward Rutledge Timber Co.*, 202 P. 1067 (Idaho 1921), the Idaho Supreme Court recognized state title to the submerged lands of Lake Coeur d'Alene and the corresponding right of public navigation. In *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1985), the Idaho Supreme Court again recognized state title to the submerged lands of Lake Coeur d'Alene, and confirmed the state's lease of a portion of the lakebed for the construction of a marina.

Thus, this case presents a situation where the state has a judicially-recognized document of title, the Idaho Admission Act, which by operation of federal law is presumed to vest the state with title to submerged lands. The state is in possession of the disputed lands pursuant to that title. It is hard to imagine a clearer case for application of the Eleventh Amendment. Where, as here, the state has both documented title and

possession, the entire interest adverse to that of the plaintiff is that of the state. The acts of state officers play no part in the critical issue, which is to determine in which party title resides. In order to proceed, the plaintiff must overcome the state's title and prove that title should be vested in the plaintiff, a result plainly prohibited by the Eleventh Amendment.

D. Because Of The Unique Nature Of Equal Footing Cases, It Was Proper To Dismiss The Tribe's Action Pursuant To A 12(b)(6) Motion.

The Tribe infers that the trial court erred by dismissing the action before the Tribe had an opportunity to present the merits of its case. It infers that the court's jurisdiction is dependent on the relative strength of the claims of the Tribe and the state, and therefore it was error to dismiss the case before the Tribe had an opportunity to present the facts underlying its claim.

Idaho does not, as the Tribe asserts, concede the necessity to reach the merits of this case in order to determine jurisdiction. Indeed, the thrust of Idaho's argument is that it is improper to reach the merits in order to determine jurisdiction because it essentially forces the state to appear and defend its claim, the very result the Eleventh Amendment is intended to avoid. It would make little sense to examine the respective claims of the Tribe and the state to the disputed submerged lands in order to determine jurisdiction. Instead, the court need only examine the nature of the issues presented to determine whether it is necessary to adjudicate the state's claimed title to the property in order to proceed.

In some unique cases, such as *Treasure Salvors*, the court may need to make a preliminary determination as to whether the state possesses colorable title, since the lack of colorable title may make it possible to proceed without adjudicating state claims. In an equal footing case, however, where the state is presumed to have title, the court need not inquire into

the validity of the state's title in order to make an Eleventh Amendment determination. Because of the equal footing presumption it is clear, even at the preliminary stages of the proceedings, that further proceedings will require the court to adjudicate the state's claim of title. In such instances, it is proper to dismiss the action through a rule 12(b) motion alleging a lack of jurisdiction. The relative strength or weakness of the facts supporting the Tribe's claim do not alter the fact that further proceedings would require adjudication of the state's claims to the disputed property.

E. The Tribe's Possession Of Sovereignty Gives It No Special Status For Eleventh Amendment Purposes.

The Tribe appears to allege that because it is a sovereign, the restrictions of the Eleventh Amendment should be relaxed. This identical argument was made and rejected in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). There, the Court confirmed that the Constitution embodies no waiver of state sovereign immunity for the benefit of tribal plaintiffs. *Id.* at 782. Indeed, it is difficult to imagine how a plaintiff's status affects the core question to be decided, which is whether the relief requested is, in substance, against the state. It is a simple function of the relief requested, and is independent of the Tribe's sovereignty.

F. The Administrative Decision Cited By The Tribe Was Withdrawn For Lack Of Jurisdiction And Because Of Substantive Error.

The Tribe infers that a 23 year-old decision of the Federal Energy Regulatory Commission (F.E.R.C.) is relevant to this Court's decision, and may even give the Tribe a colorable claim to title of the Lake. No credence can be given to such assertions in light of two important facts: (1) the state was not a party to the F.E.R.C. proceedings, and (2) the F.E.R.C. lacked the authority and expertise to make such a determination.

Furthermore, the Tribe fails to mention that prior to the order vacating the decision, the F.E.R.C. had requested that the case be remanded to the F.E.R.C. for reconsideration, based on the fact that the F.E.R.C. had misinterpreted the holding in *Buttz v. Northern Pacific Railroad Co.*, 119 U.S. 55 (1886), a decision the F.E.R.C. had mistakenly relied on for the proposition that executive agreements are effective upon ratification by the Tribe, not ratification by Congress. See 1988 W.L. 244511. Thus, the F.E.R.C. not only vacated its decision for lack of authority, it also called into question the substance of its prior holding. Under such circumstances, the Tribe is incorrect when it asserts that the F.E.R.C. proceedings were a "case in which the Tribe prevailed until the jurisdictional determination." Tribe's Brief at 5.

G. The Availability Of Alternative Remedies And Forums Is A Factor In Determining The Need To Protect Federal Supremacy.

The Tribe asserts that the availability of alternative remedies, such as an action in state court, has no bearing on whether the federal court should assume jurisdiction. *Young*, however, embodies a balance between the need to protect state sovereignty and the need to vindicate the supremacy of federal law. If there are alternative means available that will equally vindicate federal supremacy, it is axiomatic that the balance of interests falls on the side of protecting state sovereignty.

As noted above, supremacy concerns are absent in this case. But, assuming for purposes of argument that the Tribe's complaint adequately alleges violations of federal law, there are several alternatives available for vindicating the supremacy of that federal law. First, the Tribe could bring an action against the state in state court, where the state has waived its

immunity to quiet title actions.⁴ Second, the Tribe could petition the United States to bring an action on its behalf. In fact, as the Tribe notes, the United States has brought such an action, and the Tribe has successfully intervened in that action. Thus, there is an alternative means of protecting federal supremacy in this action, an alternative that, because of the presence of the United States, must be assumed to be at least as effective as the private lawsuit initiated by the Tribe.

Because the allegations of the Tribe's complaint are being addressed in a separate suit by the United States, the need to vindicate the supremacy of federal laws is fully met. It must be remembered that *Ex parte Young* is an exception to Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), and is an exception based on necessity. *Pennhurst*, 465 U.S. at 105. Where, as here, the United States has stepped in and sued the state, the necessity for a private action against the state dissipates, and the balance of interests falls on the side of protecting against further and unnecessary intrusions on state sovereignty.⁵

⁴ The Tribe's suggestion of a suit in tribal court is not a viable alternative, since the state has not waived its sovereign immunity to such suits.

⁵ As to the majority of the submerged lands at issue in the Tribe's action, the United States itself recognizes the state's title. In its amicus brief, the United States concedes that the state owns the northern two-thirds of the Lake, which lie outside the current boundaries of the Coeur d'Alene Reservation. United States' Brief at 7, 21. It also concedes state ownership of the submerged lands within Heyburn State Park, which lies within the exterior boundaries of the Reservation. United States Brief at 8. Thus, supremacy concerns are altogether absent for such lands.

H. The Court Must Address The Adverse Effect On State Title Created By The Court Of Appeal's Decision On The Merits.

The Tribe and the United States, as amicus, assert that the Court should not reach the issue of whether the President had authority to convey the disputed submerged lands to the Tribe. The necessity for the Court to reach the merits of this issue turns upon the Court's decision regarding the application of the Eleventh Amendment to the action. If the Court concludes that the Tribe's case against the officers may proceed, then the executive order issue is properly before the Court and should be decided. On the other hand, if it is decided that the federal courts lack jurisdiction over this action, then the court of appeals' decision should, at a minimum, be vacated in a manner that assures it cannot be relied upon as authority in associated actions.

In other circumstances resulting in the mootness of a judgment while awaiting review, the Court has recognized that once Article III jurisdiction is found to no longer exist, it may not be appropriate to address the merits of the case, but the Court may nonetheless "make such disposition of the whole case as justice may require." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390 (1994), quoting *Walling v. Reuter Co.*, 321 U.S. 671, 677 (1944). The Court has also recognized that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." 115 S. Ct. at 391. In such cases, vacatur is the appropriate remedy.

In this case, the state, in its motion to dismiss, did not originally seek to argue the merits of the case. It sought dismissal solely for lack of jurisdiction. The state also asserted that the complaint failed to state a claim against the officers on the basis that the officers themselves held no title or interest in the disputed submerged lands, and therefore the alleged cloud on title could not be removed by proceeding against the state officers once the state was dismissed. Resp.

App. 16-17; Joint App. 16-19.⁶ The trial court denied the motion to dismiss the action against the state officers for lack of jurisdiction. It then, *sua sponte*, reached the merits of the case, and held that the Tribe failed to state a claim because it could not overcome the presumption of state title to the disputed submerged lands. Pet. App. at 46-47.

On appeal to the Ninth Circuit Court of Appeals, the Tribe necessarily responded to the trial court's ruling by asserting that it owned the disputed lands pursuant to aboriginal title, Idaho law, and the equal footing doctrine. The state was forced to respond to the merits despite its belief that the court lacked jurisdiction over the matter.

The court of appeals proceeded to reach the merits by deciding that the President had authority to defeat a state's equal footing entitlement without explicit congressional authorization. Pet App. 27. It additionally decided that executive orders allegedly setting aside submerged lands should be treated as conveyances of title to the affected Indian tribe, as opposed to normal reservations or withdrawals of public lands. Pet. App. 26.

Despite the fact that the Eleventh Amendment requires dismissal of this action, the Court should address the adverse effect the court of appeal's decision will have on the state's claims to the disputed submerged lands. By ruling as it did, the court of appeals has fundamentally shifted the balance of any future litigation and effectively denied the State an opportunity for appellate review if this case is dismissed on Eleventh Amendment grounds. Simple dismissal will not rectify the situation. The error of forcing the state to defend this case on the merits in contradiction to the terms of the Eleventh Amendment should not be compounded by forcing the state to deal with the consequences of an adverse decision on the merits of the case. At a minimum, the court of appeals'

⁶ "Resp. App." refers to the appendix in the Brief in Opposition to Petition for Writ of Certiorari. Citations to the "Pet. App." refer to the appendix in the Petition for Writ of Certiorari.

decision must be vacated in terms that make it clear that the decision is not to be relied upon in future actions regarding ownership of the disputed submerged lands.⁷

I. The President Lacked Authority To Convey The Disputed Submerged Lands As A Matter Of Law And Further Factual Development Is Not Required To Decide The Issue.

As noted above, if the Court determines that the Tribe's action against the state officers may proceed, it must determine whether the President has authority to convey the disputed submerged lands to the Tribe. Both the Tribe and the United States, as amicus, emphasize that the state has failed to provide any authority for the proposition that the President *cannot* convey submerged lands to Indian tribes. The real concern should be, however, that the court of appeals failed to cite to any authority stating that the President *can* convey submerged lands. The court of appeals forgets that the President is not a general sovereign, but can exercise only those powers vested in him by the Constitution or by statute. The court of appeals fails to cite to any constitutional or statutory provision authorizing the President to convey submerged lands. Instead, it relies solely on the fact that the Ninth Circuit has not denied tribal claims to riverbeds in previous cases "due to the lack of explicit congressional authorization to convey riverbeds." Pet. App. 27.

Appellate court decisions that do not even purport to address the issue cannot serve as the genesis of presidential powers. If a federal court is to find that the President conveyed submerged lands to the Coeur d'Alene Tribe, it must, at

⁷ It should be noted that a disposition by this Court will not interfere, as the United States alleges, with the ongoing litigation initiated by the United States over ownership of a portion of the submerged lands at issue in this action. On the contrary, it is the court of appeals' decision that will interfere with the ongoing litigation by incorrectly finding authority to convey the disputed submerged lands to the Tribe.

the very least, identify a constitutional or statutory basis for the President's actions.

The Tribe's response perpetuates the court of appeals' error. The Tribe simply fails to identify any constitutional or statutory basis for the alleged conveyance of the disputed submerged lands. Instead, it asserts that the President can convey submerged lands under the criteria of *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), because there are submerged lands within the exterior boundaries of many executive order reservations. Otherwise, it attempts to avoid the issue by asserting that the question of whether a particular executive order conveys submerged lands is a factual question that cannot be resolved absent the presentation of further evidence. It also asserts the need for further factual development to demonstrate congressional ratification of the supposed conveyance.

First, the state does not dispute that the President created executive order reservations, nor does it dispute that there are submerged lands within the exterior boundaries of such reservations. However, the fact that submerged lands lie within the exterior boundaries of executive order reservations does not infer recognition of the authority to defeat state title to such submerged lands. In *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), the Court held that nothing can be inferred from the mere inclusion of submerged lands within the boundaries of a federal reservation. As the Court noted there, it would not be unusual for Congress to have "intended the State to hold title to the bed of a navigable lake wholly within the boundaries of an Indian Reservation." 482 U.S. at 202. In *United States v. Oregon*, 291 U.S. 1 (1935), the Court held that the submerged lands within the Lake Malheur Reservation, a wildlife refuge set apart by executive order, would pass to the state if the waters were navigable in fact. 295 U.S. at 6. Thus, the inclusion of submerged lands within executive order reservations infers neither the authority nor the intent to defeat state title to submerged lands. Also, the fact that executive order reservations may include a reservation of the

right to divert and use appurtenant waters, *Arizona v. California*, 373 U.S. 546, 598 (1963), does not infer the authority to convey submerged lands. Indeed, the *Arizona* Court distinguished the reservation of water rights from the reservation of title to submerged lands.⁸

Second, the President's authority to convey submerged lands is not a factual question dependent on the circumstances surrounding the creation of a particular reservation. If the President had authority to convey submerged lands, it is either the result of the President's inherent constitutional powers, the result of an express delegation of congressional authority, or the result of the general acquiescence to executive order reservations discussed in *United States v. Midwest Oil Co.* Either way, it is a question of law that can be decided without further factual development. Authority to convey submerged lands cannot be conferred on the President as a result of facts demonstrating his intent to do so. Nor can such authority be conferred on the President by facts demonstrating that the Tribe understood such to be the result of the President's actions. See *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947) (Indians' understanding could not confer on President "authority to convey title to them").

The more difficult issue presented by the Tribe and the United States is the assertion that the issue of the President's authority cannot be decided because a factual issue remains as to whether Congress "ratified" the President's actions after the fact by recognizing the Coeur d'Alene Reservation.

⁸ The Court held that a reservation of water rights could occur after the date of statehood, distinguishing *Shively v. Bowlby* and other equal footing cases finding that the government cannot convey submerged lands after they pass to the state. 373 U.S. at 598-99. The obvious inference is that the reservation of appurtenant waters for irrigation and other uses is not comparable to the reservation of title to submerged lands, and is not intrusive on the sovereignty of the state.

The state first notes that such an issue is outside the scope of the question which the Court agreed to review. The question presented by the state was limited to whether the President was authorized to convey title of submerged lands to the Coeur d'Alene Tribe. The question of whether Congress could later convey the submerged lands by "ratifying" an unauthorized conveyance is an entirely separate issue. Indeed, a ruling by this Court concerning the authority of the President would not foreclose consideration of the issue of later congressional conveyance were the case to be remanded to the trial court.⁹

The Tribe attempts to demonstrate the necessity to reach the issue by introducing evidence of congressional intent in the form of various congressional documents. Essentially, the Tribe attempts to try its case on the merits before this Court. The state contends, however, that this is not the proper forum to debate factual questions. Although the state possesses a large volume of material demonstrating the United States' lack of intent to convey submerged lands to the Tribe, the proper place to weigh this competing evidence is in front of a trial court with jurisdiction over all the parties.

Moreover, the material introduced by the Tribe is not relevant to the issue of whether submerged lands were conveyed to the Tribe. First, any ratification of an unauthorized conveyance would have to comply with the requirements of the *Montana* test, i.e., Congress' intent to convey the lands would have to be "definitely declared or otherwise made plain," and conveyance would have to be required by "some international duty or public exigency." *Montana v. United States*, 450 U.S. 544, 552 (1981). The bulk of the material cited by the Tribe, however, merely tends to demonstrate that Congress recognized the land set apart by the 1873 executive

⁹ Likewise, a ruling on the authority of the President to convey submerged lands will not affect the Tribe's ability to present, in the proper case, evidence relating to the Tribe's other theories, such as unextinguished aboriginal title or title under operation of state law.

order as a "reservation." The state does not dispute that the lands formed a reservation. Such a fact, however, is irrelevant to determining whether a conveyance of submerged lands occurred. This Court has held that the mere establishment of an Indian reservation does not operate "as a disposal of lands underlying navigable waters within its limits." *United States v. Holt State Bank*, 270 U.S. 49, 58 (1926).

The "ratification" advocated by the Tribe is also radically different from the principle of ratification inferred from *Holden v. Joy*, 84 U.S. (17 Wall.) 211 (1872), which stated the general principle that treaties may convey to grantees good title without an act of Congress conferring it, but also noting that it was unnecessary to decide the issue because the treaty in question had been repeatedly recognized by Congress as valid. 84 U.S. (17 Wall.) at 247. *Holden* does not necessarily recognize the principle that Congress may "ratify" unauthorized actions. The title at stake in *Holden* was conferred through a treaty, which, as this Court has recognized, may grant title of Indian lands to individuals without any act of Congress. *Jones v. Meehan*, 175 U.S. 1, 10 (1899). It is axiomatic that the congressional action required to ratify an action that the President undertook pursuant to his constitutional authority is necessarily less exacting than the congressional action required to ratify an unauthorized Presidential action.

Additionally, the fact that Congress authorized compensation for the cession of lands for railroad right-of-ways, and later for a cession of a portion of the Reservation, does not demonstrate an intent to convey submerged lands to the Tribe. The Tribe contends it is relevant because it demonstrates that Congress believed the Tribe to possess compensable title to the lands within the 1873 Reservation. This may or may not be so. Congress may have simply wished to deal equitably with the Tribe.

Regardless, the Tribe's emphasis on whether the Tribe possessed compensable title is misplaced. In its opening brief, the state demonstrated that the general authority to withdraw

federal lands delegated to the President by acquiescence and discussed in *Midwest Oil*, is, as a matter of law, limited in its scope. This principle was demonstrated by reference to *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), wherein it was held that in exercising the powers delegated by acquiescence, the President lacked authority to convey compensable title to Indian tribes. *Id.* at 331. The state then asserted that if the President's authority was so limited in scope as to deny him the power to convey compensable title to uplands, it could not possibly extend to the conveyance of submerged lands, with its accompanying adverse effect on state sovereignty.

The state's argument does not infer that if, in the context of a specific reservation, the executive order was recognized as conveying compensable title to uplands that the President would automatically be recognized as having the authority to also convey submerged lands. The standard for a delegation of such power to the President is necessarily higher than for a delegation of the power to convey uplands because of the congressional policies strongly disfavoring conveyances of submerged lands. Additionally, the disposition of submerged lands is a sovereign act, not merely a proprietary act, and therefore is outside the executive's general land management authority.¹⁰

In summary, equal footing cases are not so driven by the facts as to foreclose the determination on a 12(b)(6) motion whether portions of the Tribe's complaint fail to state a claim to the disputed submerged lands. The burden of proof placed on Tribes in equal footing cases establishes a very high

¹⁰ See *United States v. Oregon*, 295 U.S. 1, 14 (1935), describing a conveyance of submerged lands as a "separation from sovereignty." In comparison, the Court in *Midwest Oil* recognized an implied delegation to the President of congressional authority to withdraw public lands in part because "the lands laws are not of a legislative character in the highest sense of the term (art. 4, § 3), 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' " 236 U.S. at 474, quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1904).

threshold of evidence which must be presented to overcome the presumption that the United States did not convey title to the Tribe. This is especially true where it is obvious on the face of the pleadings, as it is here, that the alleged instrument of conveyance was issued without authority. To the extent that the Tribe's claims are based on an executive order issued without proper authority, it was proper to dismiss the Tribe's claims, since no set of facts could be conceived that would sustain the Tribe's claims to the disputed submerged lands.

CONCLUSION

The portion of the judgment of the Ninth Circuit Court of Appeals allowing the Coeur d'Alene Tribe to obtain a decree of its alleged title to the disputed waters and submerged lands, and injunctive relief ordering state officers act in accordance with such title, should be reversed. Additionally, that portion of the judgment holding that the executive order establishing the Coeur d'Alene Indian Reservation may be sufficient to convey the disputed submerged lands to the Tribe should be vacated or reversed.

Respectfully submitted,

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